Titular Roman Catholic Bishop of Penang v Stephen Ramachandran

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24–805–92
SELVENTHIRANATHAN JC
3 MAY 1994

Civil Procedure *— Summary proceedings — Possession of land — Facts in dispute — Persons against whom O 89 proceedings available — Application for order that tenant should comply with notice issued by town council — Whether application within scope of O 89 — Rules of the High Court 1980 O 89*

Civil Procedure *— Summary proceedings — Possession of land — Failure to state names of occupiers — Whether non-compliance with O 89 r 3(c) — Rules of the High Court 1980 O 89 r 3(c)*

Landlord and Tenant *— Order for possession — Whether summary procedure under O 89 available — Failure to state names of occupiers — Application for other orders — Whether application was proper — Rules of the High Court 1980 O 89*

Landlord and Tenant *— Tenancy — Notice to quit — Interest of tenant assigned to third party developer — Notice issued by owner to sub-tenant — Whether owner was proper person to issue notice — No notice of termination of tenancy — Whether tenancy terminated — Whether tenant was trespasser*

The plaintiff was the registered owner of land on which stood premises occupied by the defendant, his family and some other persons whose names were unknown ('the occupiers'). The plaintiff entered into a joint venture agreement with Landwide Development (M) Sdn Bhd ('the developer') to develop the land. Thereafter, the plaintiff instituted summary proceedings under O 89 of the Rules of the High Court 1980 ('O 89') for: (i) possession of the premises on the ground that the occupiers were in occupation without licence or consent; and (ii) an order that the defendant be ordered to comply with the notice issued by the Majlis Perbandaran Pulau Pinang to demolish part of the premises which had been built illegally. The plaintiff alleged that: (i) one Mary Joseph was the ground tenant of the premises; (ii) the defendant was a tenant at will of hers; and (iii) Mary Joseph had assigned her beneficial interest to the developer. The occupiers were issued with notices to quit by the developer on 14 July 1992, and by the plaintiff on 18 August 1992, in which they were described as trespassers.

The defendant contended that the premises was built by his wife's great-grandfather and that his wife's family had lived in it for over a century. He also disputed the right of Mary Joseph to assign her beneficial interest to the developer and raised an objection in respect of the plaintiff's failure to name the other occupiers.

Held, dismissing the plaintiff's application:

(1) This was not a proper case for summary proceedings for possession of land under O 89 as there were disputes of fact which could not be resolved on affidavit evidence alone. This, however, did not preclude the plaintiff from commencing proceedings for possession by writ.

(2) The notice to quit dated 18 August 1992 issued on behalf of the plaintiff was not issued by the proper party as Mary Joseph had assigned her beneficial interest in the premises to the developer in June 1992.

(3) The persons against whom summary proceedings can be instituted under O 89 are confined to trespassers and squatters simpliciter who enter on an unoccupied house or land without any right, ie those whose initial entry and continued occupation upon the land remain unlawful.

(4) The plaintiff had conceded that the defendant was a tenant at will of Mary Joseph but there was no evidence that either Mary Joseph, the developer or the plaintiff had terminated the tenancy prior to the assignment to the developer. Therefore, the defendant was clearly not a trespasser because his entry upon the premises was in the first instance lawful.

(5) Even if the notice to quit issued by the plaintiff had terminated the tenancy of the defendant, O 89 still could not be invoked because he would be a tenant holding over after the termination of the tenancy.

(6) The plaintiff's application for an order that the defendant be ordered to comply with the notice issued by the Majlis Perbandaran Pulau Pinang was clearly not within the scope of O 89 and should not have been included in the application.

(7) The failure to name the other occupiers of the premises amounted to non-compliance with O 89 r 3(c) in that the plaintiff or his agent did know of or could have obtained, the name of the other occupants of the premises.

[Bahasa Malaysia summary

Plaintif merupakan pemunya berdaftar sebidang tanah di mana terletak sebuah premis yang dihuni oleh defendan, keluarganya dan beberapa orang lain yang nama mereka tidak diketahui ('penghuni itu'). Plaintif telah mengikat suatu perjanjian usahasama dengan Landwide Development (M) Sdn Bhd ('pemaju itu') untuk memajukan tanah itu. Kemudiannya, plaintif telah memulakan prosiding terus di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('A 89') untuk mendapatkan: (i) milikan premis itu atas dasar bahawa penghuni itu menghuni premis itu tanpa lesen atau kebenaran; dan (ii) suatu perintah supaya defendan diperintahkan untuk mematuhi notis yang telah dikeluarkan oleh Majlis Perbandaran Pulau Pinang untuk

merobohkan binaan haram yang dinyatakan di dalam notis itu. Plaintif mengata bahawa: (i) seorang yang bernama Mary Joseph merupakan penyewa premis itu; (ii) defendant adalah penyewa mengikut kehendak beliau; dan (iii) Mary Joseph telah menyerahhak kepentingan benefisialnya kepada pemaju itu. Penghuni itu telah diberi notis supaya keluar daripada premis itu oleh pemaju itu pada 14 Julai 1992, dan oleh plaintif pada 18 Ogos 1992, di mana mereka telah disifatkan sebagai penceroboh.

Defendan menegaskan bahawa premis itu telah didirikan oleh moyang isterinya dan bahawa keluarga isterinya telah menghuninya selama lebih dari satu abad. Beliau juga mempertikaikan hak Mary Joseph untuk menyerahhak kepentingan benefisialnya kepada pemaju itu dan telah menimbulkan suatu bantahan mengenai kegagalan plaintif untuk menamakan penghuni yang lain.

Diputuskan, menolak permohonan plaintif:

(1) Ini tidak merupakan suatu kes yang sesuai untuk menggunakan prosiding terus bagi mendapatkan milikan tanah di bawah A 89 kerana terdapat pertikaian fakta yang tidak dapat diselesaikan berdasarkan keterangan afidavit sahaja. Ini, bagaimanapun, tidak menghalang plaintif daripada memulakan prosiding untuk mendapatkan milikan melalui writ.

(2) Notis untuk keluar dari premis itu yang bertarikh 18 Ogos 1992 yang telah dikeluarkan bagi pihak plaintif, tidak dikeluarkan oleh pihak yang betul kerana Mary Joseph telahpun menyerahhak kepentingan benefisialnya di dalam premis itu kepada pemaju itu pada Jun 1992.

(3) Orang terhadap mana prosiding terus boleh dimulakan di bawah A 89 terhad kepada penceroboh dan setinggan yang memasuki rumah atau tanah yang tidak diduduki tanpa sebarang hak, iaitu orang yang memasuki dan terus menghuni tanah itu secara haram.

(4) Plaintif telah mengaku bahawa defendan adalah penyewa mengikut kehendak Mary Joseph tetapi tidak ada bukti bahawa Mary Joseph atau pemaju itu mahupun plaintiff telah menamatkan penyewaan defendan sebelum penyerahhakkan kepada pemaju itu. Oleh itu, defendan jelas tidak merupakan seorang penceroboh kerana kemasukannya ke dalam premis itu adalah sah pada mulanya.

(5) Sekalipun notis untuk keluar dari premis itu yang dikeluarkan oleh plaintif telah menamatkan penyewaan defendan, A 89 masih tidak boleh digunakan kerana beliau merupakan penyewa yang terus menghuni premis itu selepas penamatan penyewaannya.

(6) Permohonan plaintif untuk suatu perintah supaya defendan diperintah untuk mematuhi notis yang dikeluarkan oleh Majlis Perbandaran Pulau Pinang jelas tidak terletak di dalam skop A 89 dan tidak seharusnya dimasukkan di dalam permohonan itu.

(7) Kegagalan untuk menamakan penghuni premis itu yang lain merupakan suatu ketidakpatuhan A 89 k 3(c), iaitu plaintif ataupun agennya tahu atau boleh mendapat tahu, nama penghuni lain premis itu.]

Cases referred to

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor [1991] 1 MLJ 343 (folld)

Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89 (folld)

McPhail v Persons, Names Unknown; Bristol Corp v Ross [1973] 3 All ER 393; [1973] Ch 447; [1973] 3 WLR 71 (folld)

Legislation referred to

Rules of the High Court 1980 O 89

Rules of the Supreme Court 1965 O 113 [Eng]

Margaret Kam (*Kam Asmahan & Co*) for the plaintiff.

Mohideen Abdul Kadir (*Khatijah Idris* with him) (*Mohideen & Partners*) for the defendant.

Selventhiranathan JC: The plaintiff is purportedly the registered owner of a piece of land known as Lot 354 Section 1 North-East District, Penang (the issue document of title, exh MT–1 to encl (1), appears to be incomplete and does not show the plaintiff or any other person as the registered owner of the land). On a portion of this land stands premises having postal address 356A Leandros Lane, Penang. Part of the premises is occupied by the defendant and his family.

The plaintiff instituted these summary proceedings under O 89 of the Rules of the High Court 1980 ('O 89') for possession of the premises 'on the ground that he is entitled to possession and that the person(s) in occupation are in occupation without licence or consent' and for an order that 'the defendant(s) shall comply with the notice issued by the Majlis Perbandaran Pulau Pinang dated 8 July 1992 by forthwith demolishing the illegal structure mentioned in the said notice failing which the plaintiff, his servants or agents shall proceed to demolish the said illegal structure without any further notice to the defendant(s)'.

It was asserted on behalf of the plaintiff that one Mary Joseph had been the ground tenant of the land on which the premises stands and she had been paying ground rent of RM4 to the plaintiff until about 1980. In or around June 1992, Mary Joseph sold or assigned her beneficial interest of the premises to a developer, Landwide Development (M) Sdn Bhd, with whom the plaintiff had entered into a joint venture agreement to develop the land. The defendant, who is the son-in-law of Mary Joseph, was her tenant at will but had not been paying rent to her. The defendant as well as other persons had been occupying the premises without the licence or consent of the plaintiff. The defendant and every other person occupying the premises had been issued with notices to quit by the developer on or about 14 July 1992, and by the plaintiff on or about

18 August 1992, with which notices the defendant had not complied. An illegal structure had been constructed beside the premises without the licence or consent of the plaintiff and a notice to demolish it had been received by the plaintiff from the Majlis Perbandaran Pulau Pinang. Besides the defendant, the plaintiff did not know the name of any other person occupying the premises.

On the other hand, the defendant contended that the premises, which is a house, was built by his wife's great-grandfather, one Faustin Massang, in the late 19th century and since then it had been the family home of Faustin Massang and his descendants. Over a period of a century, different members of the Massang family had looked after and maintained the house until finally, Mary Joseph took over its management upon the demise of one Francis Rajoo who was the son-in-law of Faustin Massang. The house formed part of the estate of Faustin Massang and consequently, Mary Joseph had no right to sell or deal with it without the consent of all the beneficiaries of the estate of Faustin Massang. Mary Joseph claimed that the house had been bequeathed to Francis Rajoo who in turn bequeathed it to her.

The defendant further claimed that in March 1973, he and his family were invited to move in and stay in a portion of the house by Francis Rajoo who was then looking after the house. They did so and Francis Rajoo gave them the assurance that they could stay there for as long as they wanted to. Acting on that assurance, the defendant expended about RM50,000 over a period of about 20 years to repair and renovate the house. He paid RM50 per month to Francis Rajoo initially and, after his death, to Mary Joseph to enable the ground rent and assessment in respect of the house to be paid. He also paid for the water and electricity supplied to the house. The defendant denied constructing any illegal structure beside the house and contended that that allegation was in any case irrelevant to the plaintiff's application for possession under O 89.

The parties made written submissions and highlighted the salient points of their respective cases orally, of which I took cognizance.

In my view, this is not a proper case to invoke the summary proceedings for possession of the land in question under O 89. There are disputes of fact which cannot be resolved on affidavit evidence alone. It was conceded on behalf of the plaintiff that the defendant was the tenant at will of Mary Joseph and the latter paid ground rent to the plaintiff. The defendant claimed that he paid RM50 monthly to Francis Rajoo and subsequently to Mary Joseph to enable the ground rent and assessment of the house to be paid. This was no doubt denied by Mary Joseph but it raises triable issues in relation to the status of the defendant vis-a-vis his occupation of the house. The defendant also paid for the water and electricity supplied to the house.

The initial occupation of a part of the house by the defendant and his family was with the consent of Francis Rajoo and subsequently of Mary Joseph. The notice to quit dated 18 August 1992 issued to the defendant on behalf of the plaintiff alleged that the plaintiff was the registered

A proprietor of the land and that the defendant and every other person in occupation of the premises were trespassers on the premises. By the notice, the plaintiff required the defendant and every other person in occupation to forthwith quit and deliver up possession of the *premises belonging to him* and in their occupation on the date of the notice. However, in the affidavit filed on behalf of the plaintiff in support of the application B for possession, it was asserted that Mary Joseph had sold or assigned her beneficial interest in the premises to the developer in or about June 1992. It would therefore seem that the notice dated 18 August 1992 to quit and *deliver up possession of the premises* was not issued by the proper party. Furthermore, the defendant was described as a trespasser on the premises C in the notice, of which there is doubt in the light of the concession by the plaintiff that he was a tenant at will of Mary Joseph. The notice to quit dated 14 July 1992 issued to the defendant on behalf of the developer alleged that Mary Joseph, as beneficial owner, had sold the premises to the developer and the latter required the defendant to quit and deliver up possession of the premises to the developer as the beneficial owner. D However, there was no evidence that Mary Joseph had terminated the tenancy of the defendant prior to the sale or assignment of her beneficial interest in the premises to the developer. In addition, the notice to quit issued on behalf of the developer recognized the defendant as the tenant of Mary Joseph but claimed that he had not been paying rent to Mary Joseph. E He was therefore clearly not a trespasser by the developer's own concession, inferred from the notice to quit.

In my view, the occupation of the premises and consequently the land by the defendant in the foregoing circumstances raises triable issues which cannot be resolved by resorting to the summary proceedings for possession of land under O 89. Where triable issues are raised or where the F defendant shows by affidavit evidence, as the defendant has shown here, that he has an arguable case, the summary procedure under O 89 cannot be availed of: see *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343. It would appear that the category of persons against whom summary proceedings can be instituted under O 89 is to be confined G to squatters simpliciter, ie those whose initial entry itself upon the land is unlawful and whose continued occupation of the land remains unlawful.

In *McPhail v Persons, Names Unknown; Bristol Corp v Ross* [1973] 3 All ER 393; [1973] Ch 447; [1973] 3 WLR 71, a case involving summary proceedings under O 113 of the English Rules of the Supreme Court 1965 H (the equivalent of the Malaysian O 89), Lord Denning MR discussed the position of squatters and tenants thus, ([1973] 3 All ER 393 at pp 395–398; [1973] Ch 447 at pp 456–458; [1973] 3 WLR 71 at pp 74–76), which gives in lucid terms the reasoning behind the difference in treatment between these two categories of occupiers of land or premises:

I 2 *The law as to squatters*

What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can.

...

(i) *The remedy of self-help*

Now I would say this at once about squatters. The owner is not obliged to go to the courts to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. This is not a course to be recommended because of the disturbance which might follow. But the legality of it is beyond question. The squatters were themselves guilty of the offence of forcible entry contrary to the statute of 1381 [The Forcible Entry Act 1381 (5 Ric 2 Stat 1 c 7)]. When they broke in, they entered 'with strong hand' which the statute forbids. They were not only guilty of a criminal offence. They were guilty of a civil wrong. They were trespassers when they entered, and they continued to be trespassers so long as they remained there. The owner never acquiesced in their presence there. So the trespassers never gained possession. The owner, being entitled to possession, was entitled forcibly to turn them out: see *Browne v Dawson* (1840) 12 Ad & El 624. As Sir Frederick Pollock put it in his book on *Torts* [*Pollock's Law of Torts* (15th Ed, 1951) at p 292]:

> 'A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.'

...

(ii) *The remedy by action*

Although the law thus enables the owner to take the remedy into his own hands, that is not a course to be encouraged. In a civilized society, the courts should themselves provide a remedy which is speedy and effective; and thus make self-help unnecessary. The courts of common law have done this for centuries. The owner is entitled to go to the court and obtain an order that the owner 'do recover' the land, and to issue a writ of possession immediately.

...

(iii) *The remedy by summons*

So the matter rested until some difficulties were discovered recently. When some squatters entered on vacant land belonging to the Manchester Corp, this court granted an injunction against them, but held that it could not make an order for recovery of possession except in a final judgment: see *Manchester Corp v Connolly* [1970] 1 All ER 961; [1970] Ch 420. And when some squatters occupied houses in Brighton, Stamp J held that no proceedings could be taken for recovery of possession unless they were named as defendants: see *Re Wykeham Terrace, Brighton, Sussex, ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204. The result was that if the squatters did not give their names, of it one squatter followed another in quick succession, no order for possession could be made. I must confess that I doubt the correctness of that decision. But it does not matter. The position was soon put right by new rules of court. RSC O 113 and CCR O 26 are quite clear. A summons can be issued for possession against squatters even though they cannot be identified by name and even though, as one squatter goes, another comes in. Judgment

A can be obtained summarily. It is an order that the plaintiffs 'do recover' possession. That order can be enforced by a writ of possession immediately. It is an authority under which anyone who is squatting on the premises can be turned out at once. There is no provision for giving any time. The court cannot give any time. It must, at the behest of the owner, make an order for recovery of
B possession. It is then for the owner to give such time as he thinks right to the squatters. They must make their appeal to his goodwill and consideration, and not to the courts. I think that the judgment of Goulding J in *Department of the Environment v James* [1972] 3 All ER 629; [1972] 1 WLR 1279 was correct.

C Lord Denning MR then went on to discuss the position of tenants in the following terms ([1973] 3 All ER 393 at p 398; [1973] Ch 447 at pp 458–459; [1973] 3 WLR 71 at p 76):

> 3 *The position of tenants*
>
> I must point out, however, that I have referred so far only to squatters
D who enter without any colour of title at all. *It is different with a tenant who holds over after his term has come to an end or after he has been given notice to quit.* His possession was lawful in its inception. Even after the tenancy is determined, he still has possession. If he remains in possession and in occupation, there is high authority for saying that the owner is not entitled to take the law into his own hands and remove the tenant by
E force. He should go to the court and get an order for possession. Otherwise he is guilty of a criminal offence contrary to the statute of forcible entry: see what was said in *Hillary v Gay* (1833) 6 C & P 284 at pp 285, 286 by Lord Lyndhurst CB; and *Newton v Harland* (1840) 1 Man & G 644. He may not be liable to a civil action for damages: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, [1918–19] All ER
F Rep 798. But, nevertheless, his conduct is unlawful and should not be countenanced by the courts of law. Any doubt on this score is nowadays removed by s 32 of the Rent Act 1965 which says that where a tenancy has come to an end but the occupier continues to reside in the premises, it is not lawful for the owner to recover possession otherwise than by proceedings in the court. (Emphasis added.)

G Lawton LJ, in the same case, continued thus ([1973] 3 All ER 393 at p 401; [1973] Ch 447 at p 462; [1973] 3 WLR 71 at p 79):

> It follows, in my judgment, that *squatters were never able* to enlist the aid of the Court of Chancery *to resist a writ of possession* and they cannot now. *The position of tenants and licensees holding over may be different.* (Emphasis added.)

H In *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89, which was an appeal against the decision of mine, the Supreme Court, after stating that the court of first instance has to consider whether the tenants (by which it must have meant the persons in occupation) are trespassers pure and simple for which the summary procedure under O 89 had been
I specially introduced, or whether they are tenants holding over either from the previous or present landlords after the termination of the tenancy, went on to speak through Mohamed Azmi SCJ as follows at pp 93–94 of the report:

... The distinction is relevant for the purpose of O 89(1) of the RHC which provides:

'Summary Proceedings for Possession of Land

(1) Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.'

The words in parentheses are crucial. If the appellants are tenants holding over after termination of the monthly tenancy by the notice to quit, then O 89 is inapplicable. It should be noted that O 89 has its origin in O 113 of the English Rules, and the principle behind *McPhail v persons, names unknown; Bristol Corp v Ross* [1973] Ch 447 is clearly to limit the operation of the summary procedure of O 89 to trespassers pure and simple, whether known or unknown. In our view, the summary procedure should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be the facts and the law for determination by evidence viva voce. In this connection, we approve the judgment of Wan Adnan J in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221; [1991] 1 MLJ 404 as discussed by Edgar Joseph Jr J (as he then was) at p 224, and upheld by the Supreme Court.

... The summary procedure under O 89 is governed by the same principles as those under O 14 of the RHC 1980. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact. It is only in clear cases of trespass that a summary order can be made under O 89. The learned judicial commissioner did not seem to address his mind sufficiently to the importance of determining the existence or absence of triable issues. It is unfortunate that the learned judicial commissioner did not give due consideration to the Federal Court decision of *Leong Yoong v Lee Sem Yoong* [1968] 2 MLJ 72 (cited to him in argument) where it was held that where reliance is placed on the provision of the Act to avoid eviction by landlord, all that the tenant has to do is to show that he is a protected tenant under the Act. In the circumstances, the application by originating summons although remedied by the learned judicial commissioner to one under O 89 of the RHC should be dismissed as there are triable issues of fact and law, and as such the application for vacant possession ought to have been commenced by writ.

Similarly, in the present case, the defendant, by an admission made on the plaintiff's behalf itself, was a tenant at will of Mary Joseph. That tenancy was not terminated by the latter nor by her successor in title, the developer, to whom she had sold or assigned her beneficial interest in the premises. The notice to quit issued by the developer did not purport to terminate the tenancy of the defendant. His occupation of the premises was purportedly terminated by the plaintiff who described him as a trespasser in the plaintiff's notice to quit. The defendant, on the other hand, questioned Mary Joseph's right to sell or assign any interest in the premises which had been occupied by Faustin Massang and his descendants over a period of nearly one century, and one of whose descendants was the defendant's wife. The defendant claimed that the premises in fact formed part of the estate of Faustin Massang.

A In the circumstances, it was clear that the defendant was not a trespasser pure and simple against whom the summary procedure under O 89 could be resorted to. His entry upon the premises was in the first instance lawful and, to quote from the judgment of Mohamed Azmi SCJ in *Chiu Wing Wa* [1994] 1 MLJ 89, '... there must necessarily be the facts and the law for determination by evidence viva voce'. This is further B strengthened by what was said by the same judge in the Supreme Court in *Bohari* [1991] 1 MLJ 343 at p 346 of the report:

> Finally, it has come to our knowledge that recently in *Mohd Rawi bin Yaacob v Federal Land Development Authority*, another panel of this court (Abdul Hamid Omar LP, Gunn Chit Tuan and Jemuri Serjan SCJJ), had in allowing C an appeal held that where the entry to the land is lawful, and where there are triable issues, O 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

Although in *Chiu Wing Wa* [1994] 1 MLJ 89 the defendants claimed the protection of the Control of Rent Act 1966, which the defendant does not D seek to claim here, the fact remains that the Supreme Court in that case held that proceedings under O 89 can only be resorted to against trespassers who, to quote Lord Denning MR in *McPhail* [1973] 3 All ER 393; [1973] Ch 447; [1973] 3 WLR 71 enter on an unoccupied house or land '*without any colour of right*' (emphasis added). That decision of the Supreme Court is binding upon me.

E

In the present case, the defendant did not enter the land and occupy the house as a trespasser. His initial entry thereon was at the invitation of Francis Rajoo and he became a tenant at will of Mary Joseph, the predecessor in title of the developer. The defendant in fact disputed Mary Joseph's right to sell or assign her interest in the house to the developer. F However, even accepting for the present purpose that the developer is the successor in title of Mary Joseph, the tenancy of the defendant was not terminated by the developer. Neither was it even purportedly terminated by the plaintiff who chose to treat the defendant as a trespasser in the notice to quit. In the circumstances, the status of the defendant as a tenant at will remained unaltered. Even if the notice to quit issued on behalf of G the plaintiff is considered to effectively terminate the tenancy of the defendant, the procedure under O 89 still cannot be invoked against him because, even if he is not a tenant at will at present, he would be a tenant holding over after the termination of the tenancy. And the procedure under O 89 cannot be invoked against a tenant (irrespective of the epithet H used to describe the type of tenancy) and a tenant holding over after the termination of the tenancy.

It is further observed that the plaintiff not only applied for possession of the premises on the land but also for an order that '... the defendant(s) ... comply with the notice issued by the Majlis Perbandaran Pulau Pinang I ... by forthwith demolishing the illegal structure mentioned in the said notice ...' erected on the land. The application of the plaintiff for this additional relief is clearly not within the scope of O 89 and should not have been included in the application as the only claim that could have been made was for the recovery of possession of the land. The authors of *The*

Supreme Court Practice 1988 comment as follows on the scope of the English O 113 at para 113/1—8/1 in vol 1: A

> In proceedings under this Order, the only claim that can be made in the originating summons is for the recovery of possession of land; notwithstanding O 15 r 1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r 1. B

Therefore the further relief for the demolition of the illegal structure on the land should not have been sought as such relief is not within the scope of proceedings under O 89. This is even more so in the light of the admission on behalf of the plaintiff that it was never alleged that it was the defendant himself who built the illegal structure on the land. C

A further objection raised on behalf of the defendant pertained to the failure of the plaintiff to name other persons occupying the premises on the land whose names the plaintiff or his agents knew. It was deponed on behalf of the plaintiff that neither he nor his agent knew the name of any person occupying the premises who was not named in the application. However, subsequent affidavits filed on behalf of the plaintiff and the defendant showed that one person and her family at least, besides the defendant and his family, had been in continuous occupation of the premises since 1967. She is Leela d/o Mutthu (see encls (9), (11) and (15)) whose name could have been obtained with reasonable diligence from Mary Joseph as the plaintiff and his agents were aware that persons other than the defendant were also in occupation of the premises (see para 8 of encl (1) and the notice to quit issued on behalf of the plaintiff exhibited thereto, and encls (2), (9), (11) and (15)). In these circumstances, there was non-compliance with O 89 r 3(c) in that the plaintiff or his agent did know of, or at least by the exercise of reasonable diligence could have obtained, the name of Leela d/o Mutthu for her to be included in the application but chose instead to state otherwise. D E F

Having therefore found that the entry by the defendant onto the land in the first instance was lawful and that there were triable issues in relation to his continued occupation thereof, and in view of the other unsatisfactory features of the application adverted to above, I dismissed the application with costs. This does not, of course, preclude the plaintiff from commencing proceedings with a claim for possession in the usual way by writ action. G H

Finally, for the record and to explain the delay of some two months in making available these grounds of judgment since the filing of the notice of appeal on 26 February 1994 (which was received in my chambers on 24 March 1994), these grounds of judgment have been prepared with secretarial assistance from outside the office as I do not have secretarial assistance at present. I

Application dismissed.

Reported by Anne Khoo